In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 319

ROBERT K. MOOKINI AND LEE SAU CHONG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We do not oppose the granting of a writ of certiorari in this case. We respectfully suggest, however, that review be limited to the question whether the Criminal Appeals Rules, promulgated by this Court May 7, 1934, are applicable to criminal cases in the United States District Court for the Territory of Hawaii.

Petitioners were convicted in the United States District Court for the Territory of Hawaii, upon verdict of a jury, of presenting false claims, in violation of Section 35 of the Criminal Code (U. S. C.,

16372—37

Title 18, Sec. 80), on May 28, 1935 (R. 80). They filed separate motions for new trials on June 7, 1935 (R. 81, 92), which were denied on June 19, 1935 (R. 78–79). Petitioners were sentenced on June 29, 1935 (R. 79–80). On September 27, 1935, they petitioned for an appeal (R. 114), which was allowed by the trial court on the same day (R. 115). The Circuit Court of Appeals for the Ninth Circuit held that the Criminal Appeals Rules govern the practice and procedure in criminal cases in the United States District Court for the Territory of Hawaii; and that, as the appeal had not been taken within five days after the entry of the order denying the motions for a new trial, as required by Rule III, it must be dismissed (R. 1016–1021).[1] Accordingly, the Circuit Court of Appeals did not pass upon any of the questions presented by the petitioners' assignment of errors (R. 116–127).

In neither the original brief of the petitioners nor that of the Government in the Circuit Court of Appeals was there any question presented as to whether the Criminal Appeals Rules are or are not applicable to the United States District Court for the Territory of Hawaii. It appears, however, that on oral argument that court, on May 24, 1937, raised this question itself, and that counsel were instructed to file further briefs. (See R. 1015.)

[1] The Circuit Court of Appeals also pointed out that the appeal was not taken in the manner specified in Rule III, i. e., by notice of appeal (R. 1017).

In their supplemental brief, Government counsel called to the attention of the court the fact that the District Court of Hawaii and the United States Attorney for that District had been advised by the Attorney General that the Criminal Appeals Rules were, in his opinion, not applicable to the District Court for the Territory of Hawaii. Government counsel also pointed out that the Attorney General, in submitting to this Court a draft of proposed rules governing practice and procedure in criminal cases, stated that as there was not sufficient data at hand upon which to predicate proposals at that time relative to practice and procedure in cases instituted in the District Court of Hawaii, as well as in other territorial, insular or consular courts, "The Rules [proposed] are limited in their application to proceedings in cases instituted in the District Courts of the United States and in the Supreme Court of the District of Columbia."[2]

Government counsel, in their supplemental brief, then referred to considerations based upon the language of various provisions of the Hawaiian Organic Act, the statute under which the Rules were promulgated, and the order of this Court promulgating the Rules, from which the conclusion could be drawn that the Rules were applicable to the District Court for the Territory of Hawaii. A

[2] See extracts from the supplemental brief of Government counsel in the Circuit Court of Appeals which are printed in the Appendix, *infra* p. 5.

sufficient statement of such considerations for present purposes is embodied in the opinion of the Circuit Court of Appeals (R. 1016–1021).

The question is obviously one as to which an authoritative expression from this Court is desirable.

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BRIEN MCMAHON,
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Special Assistant to the Attorney General.
M. JOSEPH MATAN,
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Attorneys.

SEPTEMBER 1937.

APPENDIX

Extracts from the supplemental brief of Government counsel filed in the Circuit Court of Appeals:

> Before proceeding to discuss the applicability of the rules it should be stated that this office has been advised by the Attorney General that the rules are in his opinion inapplicable, and that the District Court of Hawaii and the United States Attorney for the District of Hawaii are so advised.
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> If the intent of the Supreme Court may be ascertained from the history of the enactment of the rules, it seems that they were originally drafted and submitted to the Chief Justice with intention that the District Court of Hawaii be excepted from their operation.
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> On May 26, 1933 the Attorney General of the United States upon the request of the Chief Justice presented a draft of proposed rules governing practice and procedure in criminal cases. This draft in part forms the basis of the rules adopted by the Supreme Court. This draft, in designating the courts to be affected uses the identical language of the rules, i. e. "District Courts of the United States."
>
> The Attorney General in a statement accompanying the draft states:
> "The Rules are limited in their application to proceedings in cases instituted in the District Courts of the United States and in the Supreme Court of the District of Colum-

bia. There is not sufficient data at hand upon which to predicate proposals at this time relative to practice and procedure in cases instituted in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, or in the Supreme Courts of Hawaii and Puerto Rico, or in the United States Court for China. It is thought that it would be the part of wisdom to establish the rules for practice and procedure for Continental United States before attempting to provide for the Territories, Insular Possessions and Consular Courts, as these situations will undoubtedly require special treatment because of local conditions and the distance separating the trial court from the Appellate Court."

Assuming that the intent expressed by the Attorney General was adopted with his language it is clear that the intention was to exclude the District Court of Hawaii from the operation of the rules.

U. S. GOVERNMENT PRINTING OFFICE: 1937